

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 10-N-05835-RAH
)	
BARRY M. ORLYN,)	
)	DECISION & ORDER OF
Member No. 37228,)	INVOLUNTARY INACTIVE
)	ENROLLMENT¹
<u>A Member of the State Bar.</u>)	

Introduction

In this rule 9.20 proceeding, which proceeded by default, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charges that respondent **BARRY M. ORLYN**² willfully failed to comply with California Rules of Court, rule 9.20 (rule 9.20) as ordered by the Supreme Court on March 24, 2010. Specifically, the State Bar charges that respondent failed to file a 9.20(c) compliance affidavit with the State Bar Court as required under rule 9.20(c).³

¹ The Rules of Procedure of the State Bar of California were amended effective January 1, 2011. Nonetheless, the court orders the application of the former Rules of Procedure of the State Bar based on a determination that injustice would otherwise result. (See Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 3.)

² Respondent was admitted to the practice of law in this state on June 14, 1965, and has been a member of the State Bar of California since that time.

³ Rule 9.20(c) provides: “Within such time as the order may prescribe after the effective date of the member’s disbarment, suspension or resignation, the member must file with the Clerk of the State Bar Court an affidavit showing that he or she has fully [performed the acts specified in rule 9.20(a)]. The affidavit must also specify an address where communications may be directed to the disbarred, suspended, or resigned member.”

For the reasons set forth below, the court finds respondent culpable of the charged misconduct and concludes that the appropriate level of discipline is disbarment. Accordingly, the court will recommend that respondent be disbarred. Moreover, in light of its disbarment recommendation, the court must order that respondent be involuntarily enrolled as an inactive member of the State Bar of California pending the final disposition of this proceeding. (Bus. & Prof. Code, § 6007, subd. (c)(4).)⁴

Significant Procedural History

On December 29, 2010, the State Bar filed a notice of disciplinary charges (NDC) against respondent in case numbers 07-O-13218 (10-O-02991; 10-O-09302) and 10-N-05835 (consolidated) and, in accordance with section 6002.1, subdivision (c), properly served a copy of the NDC on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar (official address). Service of the NDC on respondent was deemed complete when mailed regardless of whether he received it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; but see *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

The United States Postal Service (Postal Service) did not return, to the State Bar as undeliverable or otherwise, the copy of the NDC that the State Bar served on respondent by certified mail. Nor did the Postal Service send the State Bar a delivery receipt (i.e., a green card) showing that the service copy of the NDC was actually delivered to respondent at his official address. Moreover, respondent failed to file a response to the NDC, which was due no later than January 24, 2011. (Rules Proc. of State Bar, former rules 103(a); 63 [computation of time]; see also Code Civ. Proc., § 1013(a).) Thus, on March 7, 2011, the State Bar filed a motion for the entry of respondent's default.

⁴ Unless otherwise noted, all further statutory references are to the Business and Professions Code.

Attached to the March 7, 2011 motion for entry of default is the declaration of Deputy Trial Counsel Charles T. Calix. That declaration establishes that, in addition to serving a copy of the NDC on respondent by certified mail, the State Bar took a couple of additional steps in an attempt to insure that respondent receives actual notice of this disciplinary proceeding. Those additional steps included the State Bar mailing courtesy copies of the March 7, 2011 motion for entry of default to respondent at two additional addresses that the State Bar located for him using two Internet search engines.⁵

Respondent never filed a response to the State Bar's motion for entry of default or to the NDC. Because all of the statutory and rule prerequisites were met and because respondent was given adequate notice of this proceeding (U.S. Const., 14th Amend.; *Jones v. Flowers, supra*, 547 U.S. at pp. 224-227, 234), on April 7, 2011, the court filed an order entering respondent's default and, in accordance with section 6007, subdivision (e)(1), ordering that respondent be involuntarily enrolled as an inactive member of the State Bar of California, effective April 10, 2011.⁶

On April 27, 2011, the State Bar filed a request for a waiver of default hearing and a brief on culpability and discipline.

Initially, the court took the case under submission for decision without a hearing on April 27, 2011. However, in an order filed on May 11, 2011, the court vacated that submission; severed the three unrelated original disciplinary proceedings; and then resubmitted case number 10-N-05835-RAH for decision without a hearing.

⁵ The people-locate/search function under the Public Records tab on the main screen on LexisNexis is also helpful in locating an individual's current address, phone number, etc.

⁶ Unless respondent's default is set aside, respondent will remain on involuntary inactive enrollment until the effective date of the Supreme Court order in this proceeding. (§ 6007, subd. (e)(2).) Of course, inactive members of the State Bar of California, like respondent, cannot lawfully practice law. (§ 6126, subd. (b); see also § 6125.)

Findings of Fact and Conclusions of Law

Under section 6088 and former rules 200(d)(1)(A) and 201(c) of the State Bar Rules of Procedure, upon the entry of respondent's default, the factual allegations (but not the charges or conclusions) set forth in the NDC were deemed admitted and no further proof was required to establish the truth of those facts. Accordingly, the court adopts the facts alleged in the NDC as its factual findings. Those factual findings establish the following disciplinary violation by clear and convincing evidence.

Findings of Fact

On March 24, 2010, the Supreme Court filed an order in case number S178577 (State Bar Court case number 05-O-04575), styled *In re Barry M. Orlyn on Discipline (Orlyn I)*, placing respondent on four years' stayed suspension and three years' probation on conditions, including a two-year suspension that will continue until respondent makes restitution to a client in the principle sum of \$9,000 (plus interest) and until respondent provides proof of his rehabilitation, fitness to practice, and present learning and ability in the general law in accordance with Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).⁷

In *Orlyn I*, the Supreme Court also ordered respondent to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of its March 24, 2010 order.

After the Supreme Court filed its March 24, 2010 order in *Orlyn I*, the Clerk of the Supreme Court promptly mailed a copy of the order to respondent at his official address. Shortly thereafter, respondent actually received that service copy of the Supreme Court's order.

The Supreme Court's March 24, 2010 order became effective on April 23, 2010 (Cal. Rules of Court, rule 9.18(a)) and has continuously remained in effect since that time. Thus,

⁷ The standards are located in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

respondent was required to perform the acts specified in rule 9.20(a) no later than May 23, 2010 (30 days after April 23, 2010) and to file the affidavit required in rule 9.20(c) with the State Bar Court Clerk no later than June 2, 2010 (40 days after April 23, 2010).

As of December 29, 2010, the date on which the State Bar filed the NDC in this proceeding, respondent had not filed a rule 9.20(c) compliance affidavit (i.e., an affidavit stating that he had performed the acts specified in rule 9.20(a) and setting forth an address for future communications).

Conclusions of Law

The record clearly establishes that respondent willfully violated rule 9.20(c) when he failed to file a compliance affidavit with the Clerk of the State Bar Court no later than June 2, 2010. Respondent was required to file a rule 9.20(c) compliance affidavit even if he had no law practice, clients, or pending cases on March 24, 2010 (i.e., the date on which the order directing respondent's compliance with rule 9.20 was filed). (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341 [applying former rule 955 of the California Rules of Court (now rule 9.20)].)

Aggravation

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Prior Record of Discipline (Std. 1.2(b)(i))

Respondent has one prior records of discipline. (Std. 1.2(b)(i).) Respondent's prior record of discipline is *Orlyn I* in which, as noted above, the Supreme Court placed respondent on four years' stayed suspension and three years' probation on conditions, including an actual suspension of at least two years. In *Orlyn I*, respondent was found culpable of the following four counts of misconduct: (1) misappropriation constituting moral turpitude (§ 6106); (2) failure to deposit client funds in a client trust account (Rules Prof. Conduct, rule 4-100(A));

(3) unauthorized endorsement constituting moral turpitude (§ 6106); and (4) failure to notify client regarding receipt of funds (Rules Prof. Conduct, rule 4-100(B)(1)).

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) There is no evidence of any mitigating circumstance. Nor is there any mitigation otherwise apparent in the record.

Discussion

In determining the appropriate level of discipline, the court ordinarily looks to the standards first (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628) and to caselaw second (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580). However, the standards do not address the appropriate level of discipline in rule 9.20 proceedings. (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295.) Instead, rule 9.20(d) does.

Under rule 9.20(d), an attorney's willful failure to comply with the provisions of rule 9.20 “is a cause for disbarment or suspension and for revocation of any pending probation.” Even though rule 9.20(d) provides for the sanctions of suspension and revocation of probation, caselaw makes clear that, in the absence of compelling mitigating circumstances, disbarment is the ordinary and appropriate level of discipline for violating a provision of rule 9.20. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch, supra*, 3 Cal. State Bar Ct. Rptr. at p. 296, and cases there cited.)

Among other things, a suspended attorney's timely compliance with rule 9.20(a) performs the critical function of ensuring that all concerned parties, including clients, cocounsel, opposing counsel, courts, agencies, and other tribunals, promptly learn of the attorney's suspension and

consequent disqualification to act as an attorney. When the attorney fails to file a rule 9.20(c) compliance affidavit, this court and the Supreme Court cannot determine whether this critical function has been performed. In addition, compliance with rule 9.20(c) ensures that this court and the Supreme Court are apprised of the location of attorneys who are subject to their disciplinary authority. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.)

Respondent's unexplained failure to file a rule 9.20(c) compliance affidavit strongly suggests a conscious disregard for this court's and the Supreme Court's efforts to fulfill their respective responsibilities to oversee the practice of law in the State of California. Moreover, there is no mitigation, much less compelling mitigation, that would warrant a departure from the ordinary and most consistently imposed sanction of disbarment under rule 9.20(d).

Recommendations

Discipline

The court recommends that respondent BARRY M. ORLYN, State Bar No. 37228, be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

California Rules of Court, Rule 9.20

The court further recommends that BARRY M. ORLYN be ordered to again comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

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Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that BARRY M. ORLYN be involuntary enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 5.111(D)(1)).

Dated: July_14__, 2011.

RICHARD A. HONN
Judge of the State Bar Court